IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL., *Appellants*

v.

TOWN OF HEMPSTEAD

On Appeal from the Court of Appeals of the State of New York

MOTION OF NATIONAL CRUSHED STONE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Crushed Stone Association respectfully moves, pursuant to Rule 42 of this Court, for leave to file the annexed Brief Amicus. Appellee has refused to consent to the filing of this brief. The interest and the reason for participation of the Association are as follows:

The National Crushed Stone Association is a trade association composed of commercial producers of

crushed stone throughout the United States and Canada. Zoning of quarries and related regulatory measures have been among the principal areas of interest of the Association in recent years. This is due to the fact that, across the nation, members of the Association have felt themselves oppressed by hostile zoning ordinances and regulations as urban areas extended into the formerly rural sections where quarry operations are typically located. The widespread existence of the problem is attributable to the economics of our industry.

Stone is a high-bulk, low-value commodity. In consequence, transportation charges tend to constitute a high percentage of the delivered price of crushed stone. This economic fact compels the operator to locate his quarry as close to market as possible. With the extraordinary increase in urban populations over the past 20 years, numerous quarry owners—such as Mr. Goldblatt—have found their operations engulfed by suburbia. Hard-pressed city planners, themselves overwhelmed by the twin tides of population shifts and increases, and often subject to strong local political pressures, have exhibited little sympathy for the stone producer. The present case is illustrative of the impact of these combined social, political and economic forces on the crushed stone industry.

The regulatory ordinance here in issue has the practical effect of terminating quarrying operations which long antedate the development of the community that now surrounds them. The ordinance does not rest upon a finding that the operation in question is dangerous to the health or welfare of that community or that it constitutes an abatable nuisance. On the contrary, the record is absolutely devoid of any evidence to support

such a finding and none was made. So far as appears from the record, the ordinance is based solely upon the antipathy of the community to an industrial operation in its midst. The New York Court of Appeals, however, took judicial notice of the "fact" that quarry operations are intrinsically dangerous and, on this basis alone, concluded that the ordinance was a reasonable exercise of the regulatory authority of the local community. The Court ignored the argument of appellants that the Ordinance, even if otherwise valid, was unconstitutional because it failed to provide for the payment of just compensation.

From the point of view of the members of the crushed stone industry, the gravity of such a holding cannot be overstated. If these principles should be approved by this Court, quarry operations would, henceforth, exist entirely at the whim of local regulatory authorities. As a matter of public policy this would be intolerable since it would condition economic survival on political favor. As a matter of constitutional law the effect would be to deprive the quarry owner of his property without procedural or substantive due process. If the right to a hearing is to mean anything, it must, at least, encompass an opportunity to persuade the hearer. This opportunity is denied if the hearer may notice as the determinative "fact" that which the litigant vigorously denies to be true. Similarly, the guarantee of just compensation imported into the Fourteenth Amendment by the due process clause is illusory if a municipality may avoid its requirements by the simple device of denominating a confiscatory ordinance a "regulation."

Moreover, it would appear that the state Courts attributed no significance to the fact that the Ordinance

would end the exploitation of a natural resource. In the Association's brief are discussed the several factors which warrant application of unique principles in cases where the ordinance in issue has such an effect.

CONCLUSION

Because of the importance to the crushed stone industry of the questions presented and because the points discussed therein should be considered by this Court, it is respectfully submitted that the Motion For Leave To File the Annexed Brief Amicus should be granted.

Respectfully submitted,

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Mineral Facts and Problems, (1960 Ed.), U. S. Department of Interior, Bureau of Mines, Bulletin 585 17, 18, 20
1 Minerals Yearbook, 1959, U. S. Department of the Interior, Bureau of Mines 18
Pit and Quarry Handbook, (53rd Ed.) 18
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BRIEF OF THE NATIONAL CRUSHED STONE ASSOCIATION AS AMICUS CURIAE

STATEMENT

Appellants own 38 acres of land in the town of Hempstead, Long Island. The property has been used for commercial mining of sand and gravel since 1927 (R. 177). Within a year after operations began excavation had gone below water level and an artificial lake had been created (R. 18). By 1945 the area had changed from a "sparsely to a densely populated region" (R. 178). In that year Appellee enacted Ordinance No. 16 (R. 178). The Ordinance required, *inter alia*, that no pit excavation be made within ten feet of any property line; that all such pit excavations be sur-

rounded by a six-foot, chain-link fence; and that the declining angle of the slope of the pit not be steeper than 45 degrees (R. 205). To comply with the provisions of the Ordinance, Appellants totally enclosed their property with a six-foot, chain-link fence, topped by three strands of barbed wire. (R. 44, 82). The sides of the excavation were not within ten feet of any property line (R. 120), and the angle of the slope of the pit was not in excess of 45 degrees (R. 82). In short, Appellants achieved full compliance with Ordinance No. 16, as originally enacted (R. 201).

Sometime prior to 1956 Appellee Town adopted a zoning ordinance placing Appellants' property in a "Residence 'B' Zone" (R. 17), and in 1956 Appellee brought an action to restrain Appellants from operating their pit on the theory that the dredging operations constituted a violation of this ordinance.[1] The trial court in that case denied the injunction, finding Appellants' operation to be a prior nonconforming use of the property. No appeal appears to have been taken from the trial court's decree.

In 1958 Appellee amended Ordinance No. 16—the "regulatory" ordinance first enacted in 1945. Section 4 of the Ordinance was amended to provide that (1) no pit excavation shall be made within 20 feet of any property line (R. 7) (Before amendment the minimum distance had been 10 feet, R. 205); (2) the fence required by the original ordinance be set ". . . on a concrete curb not less than eighteen inches in depth" (R.

[1] The Town zoning ordinance is unrelated to Ordinance No. 16. That Appellee chose to bring its action under the zoning ordinance rather than under Ordinance No. 16 demonstrates Appellee's recognition of the fact that Appellants were in compliance with the terms of Ordinance No. 16.

7); and (3) the angle of the slope be not greater than 30 degrees (R. 7) (formerly 45 degrees, R. 205). In addition to these changes Section 4 of the amended Ordinance contained the following new requirements:

> "(h) No excavation shall be made below two feet above the maximum ground water level at the site.
>
> * * *
>
> "(j) When earth has been removed from any part of any pit excavation area to the maximum extent allowable, . . . such pit . . . shall be *immediately* refilled with clean non-burnable fill." (Emphasis Added) (R. 8)

The Ordinance as amended also required that a written permit be obtained from the Town as a condition of future or continued excavation (R. 6). Appellants failed to comply with these amendments, and the Town then brought this suit to enjoin them from operating the pit until the permit was obtained and all violations of the amended Ordinance had been corrected.

At the trial Appellants introduced uncontradicted evidence that there are a number of ponds and lakes within the Town which are not in compliance with the terms of the Ordinance (R. 99-123, 129-132, 144-148, 158-160 and 161-162); that there never had been a cave-in at the pit (R. 121); and that to refill the pit would require one million cubic yards of earth (R. 203). Appellee introduced no evidence to prove that the new 20 foot berm and 30 degree slope requirements were reasonable or necessary to insure proper lateral support to adjoining landowners, nor did the Town show what change in circumstances made the original fencing requirements insufficient to protect the community.

Notwithstanding, the trial court upheld the Ordinance and the enforcement thereof on the ground that "... the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers" (R. 183).

The Appellate Division, without opinion, affirmed the judgment of the Special Term (R. 195).

The Court of Appeals, three judges dissenting, affirmed the judgment of the Appellate Division (R. 199). In finding the Ordinance to be a valid exercise of Appellee's statutorily delegated police power, the Court syllogizes that since "The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge ..." and since Appellants operate a gravel pit ". . . a threat to the community's welfare may at least be said to be 'reasonably apprehended.' (*Wiggins* v. *Town of Somers*, 4 N.Y. 2d 215, 219.) ..." from the presence of Appellants' gravel pit (R. 200). In short, the Court finds the justification for the Ordinance in a judicially noticed "fact," i.e. that sandpits are dangerous, despite Appellants' insistence throughout the proceedings that their operation was not dangerous to the community and despite the record evidence introduced by Appellants to support their position.

IMPLICATIONS OF DECISION TO EXTRACTIVE INDUSTRIES AND TO THE ECONOMY

With increasing frequency owners of gravel pits and stone quarries across the country have seen their once rural locations engulfed by the tide of an expanding urban population. Communities finding such an operation in their midst have reacted to them much as the pioneers did to the Indians whom they encountered in their march across the plains. The Ordi-

nance of the Town of Hempstead is an example, albeit an extreme one, of this municipal viewpoint as manifested in both zoning and regulatory ordinances.

We do not contend that municipal regulation has, in every case, been objectionable. To the contrary, the right of a municipality to enact zoning ordinances and regulations consistent with the state's delegation of such authority and within constitutional limitations is recognized. Moreover, it is appreciated that some regulation of pits and quarries is appropriate and in many cases even necessary. For example, reasonable requirements as to fencing, set-back and dust control hardly can be objected to.

At the same time, it is submitted, regulations should not be permitted to exceed the requirements of the community. On occasion, municipalities have not so restricted their ordinances but have seen fit to enact measures which appear to go well beyond the true requirements of the cases.[2]

A comparison of these ordinances reveals a striking similarity, both in their substantive content and in the

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[2] Consider, for example, the zoning ordinance of West Whiteland Township, Pennsylvania, which became effective on March 9, 1957. West Whiteland is a sparsely-settled, rural community as evidenced both by the map which is part of the Ordinance and by the types of districts into which the ordinance divides the township—three Residential—Agricultural; commercial; and industrial. Article VII, containing the regulations relating to industrial districts states

> ". . . 3. Any other lawful use [is permitted] except the following which are specifically prohibited in any district of West Whiteland Township . . .
> "Asphalt manufacture or refining . . ."
> "Mining . . ."
> "Quarrying . . ."

form in which they are expressed. In the face of the fact that the needs of each community might reasonably be expected to differ from those of other communities this similarity further supports the conclusion that frequently these regulations bear little relation to the health, safety and general welfare requirements of the community; that they are enacted without regard for their effect upon the owner of the mineral interest and the consequences to the community; and in some instances, that they are promulgated for the express purpose of making it difficult, if not impossible, for the extractive operation to survive.[3]

Also attesting to the borderline nature of much of this regulation is the large number of instances in which individual property owners have felt sufficiently oppressed by these ordinances to contest their validity, even in the face of the presumption of constitutionality.[4]

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[3] While this may appear to be a bold contention, support for it is found in the statement of the Missouri Supreme Court. That Court, in striking down such an ordinance, stated: "It sounds well to say that we will presume, in the construction of these laws, that municipal legislators will do their duty honestly and fairly, but in administering them, this Court has continually recognized that they sometimes try, even by frauduent means, while pretending to act within their powers, to exceed and abuse them." City of St. Louis v. Atl. Quarry & Constr. Co., 244 Mo. 479, 148 S.W. 948, 952 (1912).

[4] New York Courts alone have been confronted with a so-called "gravel pit" or "top soil" ordinance on at least 15 occasions within the past 25 years.

In the following cases, the ordinance under consideration was sustained: New York Trap Rock Corp. v. Town of Clarkstown, 3 N.Y. 2d 844, 166 N.Y.S. 2d 92 (1957), appeal dismissed 356 U.S. 582; Bayley v. Adams, 303 N.Y. 967, 106 N.E. 2d 57 (1952); People v. Calvar Corp., 286 N.Y. 419, 36 N.E. 2d 644 (1947); Town of Huntington v. Broad Hollow Estates, Inc., 138 N.Y.L.J.

Generally speaking, the line of demarcation between those ordinances which have been sustained and those held to be invalid has been whether the ordinance under consideration was truly regulatory in nature or whether instead it absolutely prohibited the extraction of the mineral. Where the Ordinances have involved an absolute prohibition, courts, in line with the holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, have been quick to strike them down. *Village of Terrace Park* v. *Errett*, 12 F. 2d 240 (6th Cir. 1926), *cert. denied* 273 U.S. 710; *People* v. *Hawley*, 207 Cal. 395, 279 Pac. 136 (1929); *Ex Parte Throop*, 169 Cal. 93, 145 Pac. 1029 (1915); *Ex Parte Kelso*, 147 Cal. 609, 82 Pac. 241 (1905); *Stone* v. *Kendall*, 268 S.W. 759 (Tex. Civ. App. 1954). In other instances the Court, while sustaining the particular ordinance in question, has made it clear that prohibition of extraction was not involved and that if it had been the result might well have been different. *Miesz* v. *Mayfield*

#55, Sept. 17, 1957 (Sup. Ct. Nassau Co.) not otherwise reported, affirmed 5 App. Div. 2d 851, 172 N.Y.S. 2d 543 (1958); Lizza & Sons, Inc. v. Town of Hempstead, 272 App. Div. 921, 71 N.Y.S. 2d 14 (1947); Town of North Hempstead v. Colonial Sand & Gravel Co., Inc., 14 Misc. 2d 727, 178 N.Y.S. 2d 579 (Sup. Ct. Nassau Co. 1958); Incorporated Village of Upper Brookville v. Faraco, 282 App. Div. 943, 125 N.Y.S. 2d 214 (1953); Krantz v. Town of Amherst, 192 Misc. 912, 80 N.Y.S. 2d 812 (Sup. Ct. Erie Co., 1947); People v. Gerus, 69 N.Y.S. 2d 283 (1942); Post Brick Co. v. Thompson, 68 N.Y.S. 2d 159 (Sup. Ct. Nassau Co. 1939); Burroughs Landscape Constr. Co. v. Town of Oyster Bay, 186 Misc. 930, 61 N.Y.S. 2d 123 (Sup. Ct. Nassau Co. 1946).

In these cases the ordinance was held to be invalid: Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E. 2d 327 (1953); Lizza & Sons, Inc. v. Town of Hempstead, 175 Misc. 383, 23 N.Y.S. 2d 811 (Sup. Ct. Nassau Co. 1940); Town of Harrison v. Sunny Ridge Builders, 170 Misc. 161, 8 N.Y.S. 2d 632 (Sup. Ct. Westchester Co. 1938).

Heights, 92 Ohio App. 471, 111 N.E. 2d 20 (1952); *People* v. *Calvar Corp.*, 286 N.Y. 419, 36 N.E. 2d 644 (1947); *People* v. *Gerus*, 69 N.Y.S. 2d 283 (1942). No case has been found which sustains an ordinance—zoning or regulatory—absolutely prohibiting the further extraction of sand and gravel or crushed stone by a property owner who was engaged in such extraction prior to the passage of the ordinance.[5]

The Ordinance here differs from the cases of absolute prohibition only in that it does not, by its terms, prohibit the removal of sand and gravel. But, as has been pointed out (*supra*, pp. 2, 3), the necessary effect of the Ordinance as applied to appellants' existing operations is to prohibit the further removal of sand and gravel (at least from the 20 acres which are already below water level) as surely as if the Ordinance on its face contained an absolute prohibition.

Should this Court sustain Ordinance No. 16 as a valid exercise of statutorily delegated police power the ramifications for our industry will be widespread, transcending the immediate effect upon these Appellants.

The individual property owner extracting minerals from his property, whether it be stone, sand, oil, coal,

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[5] Some cases do uphold zoning ordinances prohibiting the expansion of an existing quarrying or gravel operation to an area in which the extraction was *not* being carried on at the time of the passage of the ordinance. Township of Bloomfield v. Beardslee, 249 Mich. 296, 84 N.W. 2d 534 (1957); New York Trap Rock Corp. v. Town of Clarkstown, 3 N.Y. 2d 844, 166 N.Y.S. 2d 92 (1957) appeal dismissed 356 U.S. 582; Town of Seekonk v. McHale & Sons, 325 Mass. 271, 90 N.E. 2d 325 (1949); Burlington v. Dunn, 318 Mass. 216, 61 N.E. 2d 243 (1945); West Brothers Brick Co. v. Alexandria, 160 Va. 271, 192 S.E. 881 (1937), appeal dismissed 302 U.S. 658, rehearing denied 302 U.S. 781.

or some other mineral, will be deprived of his last remaining protection—the assurance that, regardless of the extent to which his operations are regulated, he will not be prohibited from continuing such an operation without payment of just compensation.

The tendency of communities to employ similar language to express their requirements has been pointed out. It is not unreasonable to conclude that if Ordinance No. 16 is upheld other communities will follow appellee's example, finding in the language of the Ordinance the "final solution" to their problem. The inevitable effect of this Ordinance becoming the prototype for "regulation" of quarries will be a substantial reduction in the number of these operations. Not only the individual mineral owner, but the community as well, will be the loser if valuable deposits of these resources are forever entombed. The conclusion of the Massachusetts Supreme Court in *City of Pittsfield* v. *Oleksak*, 317 Mass. 553, 47 N.E. 2d 930 (1943), is certainly as relevant to minerals as it is to timber. As the Court declared (47 N.E. 2d at 932):

> "In the present instance, on the facts found, the application of the ordinance to stop the defendant's activities would permanently deprive the defendant, *and therefore the community,* of a valuable and otherwise wasting asset . . ." (Emphasis Added)

Moreover, such a result will discourage new quarrying ventures, for no realistic businessman with capital to invest will be likely to enter the field when it becomes known that the business in which he is considering investing is not only subject to regulation but, on whim or caprice of municipal regulatory bodies, to confiscation as well.

ARGUMENT

I. Appellants Were Denied Due Process When the New York Courts Took Judicial Notice of the Sole Determinative and Controverted Fact

It is submitted that it is within the framework of the foregoing discussion that the Court of Appeals' decision, upholding amended Ordinance No. 16 as a valid exercise of statutorily delegated police power, must be reviewed.

The recognized test for determining the constitutionality of such a regulation was well stated by the Supreme Court of Michigan recently in the case of *Township of Bloomfield* v. *Beardslee,* 249 Mich. 296, 84 N.W. 2d 534, 540 (1957):

> "In each case the question is whether, *on the peculiar facts before us,* the ordinance is a reasonable regulation in the interests of the public good, or whether it is an arbitrary and whimsical prohibition of a property owner's enjoyment of all of the benefits of his title." (Emphasis Added)

In the case at bar the decision of the Court of Appeals disregards the facts of record and rests instead on matters asserted to be "common knowledge." These matters were controverted by Appellants, were inconsistent with the facts of record and are believed to be beyond the scope of judicial notice. It may be true, as the Court declares (R. 200), that the dangers ". . . accompanying the *uncontrolled* operation of these pits are common knowledge . . ." (Emphasis Added). But to conclude as a matter of fact that since an *uncontrolled* pit is dangerous a regulated pit will be equally dangerous is clearly a *non sequitur.*

It is a well recognized principle of law that a court has the power to take judicial notice of those facts

which are of common and general knowledge, are not doubtful or uncertain and are within its jurisdiction. 20 Am. Jur. *Evidence*, Sec. 17 (1939). In other words, a court may take judicial notice of those facts which are so notorious that they will not be disputed. See 9 Wigmore, *Evidence*, Sec. 2567 (3d Ed. 1940). But as this Court stated in *Brown* v. *Piper*, 91 U.S. 37, 42-43:

> "This power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. *Every reasonable doubt upon the subject should be resolved promptly in the negative.*" (Emphasis Added)

It hardly can be said that the "requisite notoriety" exists as to the dangers attendant to the operation of this pit when three judges of the Court below take unequivocal exception to the "fact" judicially noticed, stating to the contrary that "There is nothing inherently dangerous or evil about this business, nor about excavating under water . . ."[6] That a particular gravel pit is not dangerous, *per se*, has also been concluded in other cases. The Texas Court of Civil Appeals in *Stone* v. *Kendall*, 268 S.W. 759 (Tex. Civ. App. 1925), in finding a municipal ordinance prohibiting the excavating of gravel to be "an arbitrary and unwarranted limitation upon the lawful use of property," comments:

> "Can it be said that the excavation, removal and sale of gravel by appellees in the operation of said gravel pit will in itself necessarily, or even probably, injuriously affect the health, safety, comfort or welfare of the inhabitants of said city? We think not." 268 S.W. at 761.

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[6] Even the Appellee Town candidly admits, at page 18 of its brief before the Court of Appeals, that ". . . sandpit operations are not intrinsically evil."

The Town made much at the trial of the fact that Appellants' fenced pit is situated in the midst of a large number of homes and that several thousand children attend school in the area (R. 25-34).[7] But as was pointed out by several witnesses, there are a number of sumps, ponds and lakes in the area encompassed by the Ordinance which are not in compliance therewith (R. 99-123, 129-132, 144-148, 158-160 and 161-162). The trial court, in recognizing the existence of these unfenced bodies of water, states "The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use" and "None of these were shown to be presently operated or operating sand pits, against which the ordinance is directed" (R. 185). The ownership of an unfenced body of water and the manner in which it was created do not bear on the dangers inherent in its existence. Surely the dangers to the community from a fenced body of water which coincidentally is a gravel pit are no greater than the dangers of unfenced and unguarded bodies of water naturally formed.

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[7] The very fact that the multitude of families represented by the several thousand children of their own free will and volition, chose to purchase or rent homes in close proximity to the Appellants' gravel pit tends to rebut the contention that its existence constituted a hazard requiring further regulation. Particularly significant in this regard is the fact that many of these families located in the area before the gravel pit was fenced, indicating that, at least to some, even an unfenced body of water is not inherently dangerous.

That the existence of even an unguarded and unfenced body of water is not universally regarded as being detrimental to the safety of a community—even a densely populated one—is apparent from the situation in Orlando, Florida. Within its city limits there are 54 lakes, not one of which is fenced. The Chamber of Commerce points with pride to these lakes, many of which *are* in densely populated areas.

If, as is contended, the dangers attendant to the operation of a fenced and regulated pit are not "obvious" and are not matters of "common knowledge," the judgment of the Court of Appeals cannot stand.

Judicial notice obviates the need for proof of a given "fact." Coincidentally, it cuts off the opportunity to establish the contrary of the supposed "fact." When properly employed judicial notice effects desirable savings in trial time, When improperly employed, it subverts the entire trial process. Notice of issues, confrontation of witnesses, opportunity for hearing before an impartial tribunal and all other characteristics of our adversary system of adjudication are empty formalities if at the conclusion of the process the trier may "notice" the single, controverted fact on which disposition of the case depends. Thus misused, judicial notice denies due process. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 302.

We submit that the New York courts had the duty, in determining the constitutionality of Ordinance No. 16, to consider the facts before them on the issue of "danger." As was succinctly stated by this Court in *United States* v. *Carolene Products Company*, 304 U.S. 144, 153:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts *beyond* the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . ." (Emphasis Added)

Had the New York courts not arbitrarily disregarded the testimony of sworn witnesses, they would have found *in the record* uncontradicted evidence (1) that there had never been a cave-in at the pit (R. 121); (2) that Appellants had completely enclosed the

pit with 7,000 lineal feet of six-foot, chain-link fence, topped by barbed wire and were otherwise in compliance with Ordinance No. 16 as originally enacted (R. 82, 138 and 140); and (3) that since the original enactment of Ordinance No. 16 Appellants' safety record had been unblemished. Moreover, they would have found a total absence from the record of any change in circumstances making necessary the amendment of Ordinance No. 16.

In short, a consideration of the evidence leads to the conclusion that, contrary to there being "obvious dangers" attendant on the operation of Appellants' gravel pit, there were no hazards accompanying its operation, either to persons or to property. It seems clear, then, that the substitution of judicial notice for a consideration of the facts of record deprived the Appellants of due process. *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* The statement of Mr. Justice Cardozo in that case is particularly relevant here:

> "[T]o press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." 301 U.S. at 302.

Only recently, in *Speiser* v. *Randall,* 357 U.S. 513, this Court held that a California statute denied procedural due process because it imposed on the taxpayer the burden of establishing his "loyalty" as a condition of receiving a certain tax exemption. That case involved an abridgement of First Amendment rights which the present case does not. Nonetheless, the property right at stake in the case at bar is believed to be a sufficiently important one to invoke the principle

underlying the *Speiser* holding; namely, that where state action threatens constitutional rights care must be taken to assure that maximum procedural safeguards are observed. It is submitted that the taking of judicial notice of the "fact" which determines the outcome of the litigation does not comport with this principle.

On this ground alone, the judgment of the Court of Appeals should be reversed and the case should be remanded to the state courts for a determination of the question whether actual rather than presumed dangers arise from the operation of Appellants' sand pit.

II. Absent a Real Necessity, Ordinances Such as Ordinance No. 16 are Unreasonable and Arbitrary as Applied to Enterprises Engaged in the Exploitation of a Natural Resource

Appellee apparently will assert that Ordinance No. 16, as amended, is a safety regulation reasonably adapted to the need of the local community to be protected from a hazardous condition. Appellee has insisted in this litigation that it seeks only to compel appellants to comply with the substantive provisions of the Ordinance and to procure the required permit as a condition to future operations. The Court of Appeals accepted these contentions holding that Appellee has power to protect its inhabitants from dangers "reasonably apprehended" and that:

> "The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end."

As we read Ordinance No. 16 it has the effect of prohibiting Appellants from carrying on their business. So read, we believe the Ordinance to be unreasonable.

We submit that a regulation having so heavy an impact on the property rights of the individual can be regarded as "reasonable" only when it is made to appear that prohibition is the sole feasible means to achieve an appropriate community objective. No such circumstance appears on this record.

We are aware that regulations prohibiting the continuance of otherwise legitimate businesses in given areas or restricting the pursuit of otherwise lawful occupations have been upheld by this Court on a number of occasions.[8] None of these cases, however, has presented for decision the application of such a regulation to the exploitation of a natural resource; and *Hadacheck* v. *Sebastian*, 239 U.S. 394, recognizes that there may be a basis for distinguishing the latter case from those involving other types of economic endeavors. In *Hadacheck* a municipal ordinance was upheld which forbade the manufacture of bricks in a particular area of a large city. The Court noted, however, that (at 412):

> "In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve."

We believe that there are three factors, unique to natural resource industries, which strongly suggest that special principles should apply in determining whether a regulation which prohibits the further ex-

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[8] E.g., Reinman v. Little Rock, 237 U.S. 171; Hadacheck v. Sebastian, 239 U.S. 394; Breard v. Alexandria, 341 U.S. 622; United States v. Carolene Products Co., 304 U.S. 144.

ploitation of a natural resource is "reasonable." First is the nature of the interest of the owner of a mineral deposit. Second is the national interest in the maximum utilization of our natural resource heritage; and third is the relatively more limited opportunity of the natural resource concern to relocate economically.

We develop the first point in Part III of our argument where we deal with the failure of Ordinance No. 16 to provide for the payment of just compensation. Suffice it to say here that a mineral interest is an independent property interest, capable of being severed from the ownership of the surface lands which overlie it. Regulations such as Ordinance No. 16, as amended, which prohibit the exploitation of that mineral interest, completely destroy the value of this subsurface property. Thus, they differ significantly from regulations which merely limit the *use* of surface property. We believe that an ordinance or other regulation which has substantially the effect of confiscating the property of an individual requires a greater degree of justification than one which merely limits the use of property.

Preservation of our natural resource heritage and the difficulty of relocating a natural resource concern are related points. The business of extracting minerals can not be conducted everywhere; it can only be engaged in where minerals are found. In this connection, it needs to be emphasized that deposits of stone, sand and gravel are limited. The situation regarding stone is summarized as follows in Mineral Facts & Problems, 1960 Edition, Bulletin 585, a publication of the Bureau of Mines, U. S. Department of the Interior (at 807):

> "Reserves in the United States are large, but unevenly distributed; moreover, stone deposits of the quality required by present specifications are defi-

nitely limited in many areas. Usable deposits are restricted to areas in which the products can compete favorably with substitute materials. The expense of transportation from plant to point of use is therefore a limiting factor in determining available commercial reserves. Shortage of available reserves near some metropolitan areas is becoming acute because existing deposits are being rapidly surrounded by growing suburban populations, and the consequent zoning restricts expansion and in some cases forces the producer out of business."[9]

Demand for crushed stone, sand and gravel has been growing at a remarkable rate in recent years. In 1958 domestic production of these minerals exceeded one billion two hundred million tons. Of this amount, crushed stone constituted 535 million tons. By comparison, in that year United States production of all other minerals combined amounted to only 687 million tons. (Pit & Quarry Handbook, 53d Edition, Published by Pit & Quarry Publications, Inc., Chicago, Illinois, at G-3.)

In 1959, 582 million tons of crushed and broken stone valued at $824 million were produced, an increase of 9 percent over the production of the previous year. Some idea of the myriad uses and importance of crushed stone can be gained from the following chart, prepared by the Bureau of Mines and appearing in Volume I, Minerals Yearbook, 1959 at 1005.

[9] The same shortages exist as to sand and gravel. Mineral Facts and Problems, *supra* at 710.

CRUSHED AND BROKEN STONE SOLD OR USED BY PRODUCERS IN THE UNITED STATES, BY USES
(Thousand short tons and thousand dollars)

Use	1959 Quantity	Value
Agriculture	20,819	$ 36,038
Cement	91,010	96,901
Concrete and roadstone	356,751	477,663
Fill	4,895	4,971
Filtration	316	665
Flux[10]	28,633	41,682
Glass	1,636	4,798
Lime and dead-burned dolomite	20,517	31,834
Mineral food	658	3,601
Poultry grit	1,059	8,586
Railroad ballast	11,314	12,739
Refractory	953	7,192
Riprap	17,251	21,261
Roofing granules, aggregates, and chips	1,863	11,088
Stone sand	3,973	5,163
Terrazzo	620	6,170
Other uses and unspecified	19,451	54,059
Total	581,721	$824,411

On this enormous existing, and growing, demand there will now be superimposed the requirements of the construction program authorized by the Federal-Aid Highway Act of 1956. It is estimated that this program when completed "will have required an addi-

[10] Metallurgical grade limestone is used as a fluxing agent in the steel making process. Its significance in the process is reflected in the conclusion of Kenneth K. Landes, a recognized authority in the field, that:

> "High quality (metallurgical grade) limestone is just as essential to the making of steel as iron ore; it is also necessary for the burning of lime and for the manufacture of many chemicals." Hearings on the Revenue Revision of 1951 before the House Committee on Ways and Means, 82nd Cong., 1st Sess. at 1555 (1951).

tional 10 billion tons of aggregate[11] over and above the expanding normal requirements." Mineral Facts & Problems, *supra*, at 701.

The recent increase in the demand for crushed stone and similar products has had a significant effect on the availability of economically located deposits of rock and sand. Anticipated shortages of these minerals have caused established companies to buy up the more favorably located deposits in metropolitan areas. Many of these deposits cannot be economically exploited at this time. Their development must await the exhaustion of deposits still more favorably located.

Thus, the smaller producer who loses his only deposit through municipal regulation often finds his competitors in control of the deposits which are essential to his economic survival. In antitrust terminology, ease of entry is no longer characteristic of the crushed stone industry—particularly in and around the larger metropolitan areas.

Thus, regulations such as Ordinance No. 16 are triply unfortunate in their application. They confiscate private property and destroy a going business causing severe economic hardship to the owner, the employees and all persons dependent upon the business for their livelihood. They reduce competition in a market in which demand is rising sharply and are, thus, adverse to the long-range interests of the community *qua* consumer. Finally, they deplete the nat-

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[11] Aggregate has been defined by the American Society for Testing Materials as ". . . designated inert material which when bound together into a conglomerated mass by a matrix forms concretes, mastic, mortar, plaster, etc." ASTM Standards on Mineral Aggregates and Concrete (9th Ed. 1960).

ural resource reserve of the nation at a time when aggressive and effective conservation measures are fast becoming a condition of national survival.

Some of these considerations have undoubted political overtones. We do not suggest that the courts should, or could, undertake to sit in review of the legislative judgment on such matters. We do say that these are the economic and political realities which form the backdrop against which the courts must perform their function under the Fourteenth Amendment of determining what is a "reasonable" exercise of the police power. In the light of these realities, we submit, it is appropriate and desirable that the burden should be upon the proponents of an ordinance such as amended Ordinance No. 16 to establish that no means to attain an appropriate community objective was available other than outright prohibition of the continued exploitation of a natural resource.[12] Such a rule would strike a balance between the vital but parochial interests of the local community and the national interest in the full utilization of our limited reserve of natural resources. It would also afford protection against oppressive uses of the police power such as the

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[12] Such a rule *has* been suggested by other courts. Terrace Park v. Errett, 12 F. 2d 240 (6th Cir. 1926), *cert. denied* 273 U.S. 710; City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929); Certain-teed Products Corp. v. Paris, 351 Mich. 434, 88 N.W. 2d 705 (1958). As was so well stated by Justice Black in his concurring opinion in Certain-teed, *supra*, 88 N.W. 2d at 722:

> "If an ordinance . . . projects its regulatory tentacles toward nether regions, the proponent side of the debatable question [whether the ordinance can be sustained] is considerably weakened and the contestant voice is correspondingly strengthened . . . To sustain the ordinance in such a case *there must be some dire need* . . ." which the ordinance is designed to fill.

application to Appellants of Ordinance No. 16 appears to be on the record of this case.

The rule would not be inconsistent with the prior decisions of this Court. Indeed, it is foreshadowed in some respects by *Hadacheck, supra,* and *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, which both recognize that application of regulations such as Ordinance No. 16, as amended, to mineral industries presents unique problems. The rule would restrict local governments to "the necessities of the case . . ." *Welch* v. *Swasey,* 214 U.S. 91, 105, without depriving them of the essential power to take whatever action is truly necessary for the protection of the community.

III. A State or Municipal Regulation Which Prohibits the Continuance of the Exploitation of a Natural Resource and Which Does Not Provide for the Payment of Just Compensation Violates the Due Process Clause of the Fourteenth Amendment

Normally, when a municipal or other local regulation prohibits the conduct of a business within a given area, e.g., *Reinman* v. *Little Rock,* 237 U.S. 171; *Hadacheck* v. *Sebastian, supra,* or imposes on the pursuit of an occupation conditions that may be difficult of fulfillment, e.g., *Breard* v. *Alexandria,* 341 U.S. 622, *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, *United States* v. *Carolene Products Co.,* 304 U.S. 144, no identifiable property interest can be said to have been taken from the person affected by the regulation. A particular use of land has become unlawful, but the property owner may put his land to other uses. The rooming-house operator must comply with safety regulations that entail considerable expense, but he may still operate his rooming house. Door-to-door solicitation may be restricted, but it is not forbidden. Filled milk

products must be readily distinguishable from whole milk products, but they may still be sold. Presumably, it was considerations such as these which led this Court long ago to hold:

> "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private propery. . . ." *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 255.

On the other hand, it has been pointed out only recently that:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416. In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking . . ." *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168.

We believe that a regulation which prohibits the extraction of minerals falls within the latter class. Mineral interests are recognized as "property" in virtually all states.[13] Moreover, as this Court may judicially

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[13] See, for example, Adams v. Riddle, 233 Ala. 96, 170 So. 343 (1936); Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923); New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904); Brooke v. Dellinger, 193 Ga. 66, 17 S.E. 2d 178 (1941); Attebury v. Blair, 244 Ill. 363, 91 N.E. 475 (1910); Jensen v. Sheker, 231 Iowa 240, 1 N.W. 2d 262 (1941); Barrett v. Kansas & T. Coal Co., 70 Kan. 649, 79 Pac. 150 (1905); Trimble v. Kentucky Coal Corp., 235 Ky. 301, 31 S.W. 2d 367 (1930); Emery Co. v. Lucas, 112 Mass. 424 (1873); Worcester v. Smith, 117 Me. 168, 103 Atl. 65 (1918); Rathbun v. State, 284 Mich. 521, 280 N.W. 35 (1938); Buck v. Walker, 115 Minn. 239, 132 N.W. 205

notice, there exists an active, national market in such interests which is unrelated to the ownership of the surface lands that overlie the minerals themselves. In the case at bar the mineral interest and the ownership of the fee in the surface lands are joined in Appellants, and this fact may tend to obscure the severable nature of the mineral interest. Indeed, Appellee argued in the state courts and in its Motion to Dismiss the appeal here (at pp. 11 and 14) that Ordinance No. 16 when enforced would still leave Appellants with a valuable piece of real property in a heavily populated urban area. The implication is that the Ordinance has merely restricted the use of Appellants' land and that the case is analogous to those prior instances in which this Court has held such restrictions do not exceed the police power of a local community.

It is true, of course, that a regulation which forbids the extraction of a mineral incidentally restricts the use of the land which overlies the mineral; but the point is irrelevant. The real impact of the regulation falls upon the mineral interest itself. The regulation

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(1911); McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945); Snoddy v. Bolen, 122 Mo. 479, 24 S.W. 142 (1894); Rist v. Toole County, 117 Mont. 426, 159 P. 2d 340 (1945); Zinc Co. v. New Jersey Franklinite Co., 13 N.J. Eq. 322 (1861); White v. Miller, 200 N.Y. 29, 92 N.E. 1065 (1910); Outlaw v. Gray, 163 N.C. 325, 79 S.E. 676 (1913); Edwards v. McClurg, 39 Ohio St. 41 (1883); Cornelius v. Jackson, 201 Okla. 667, 209 P. 2d 166 (1948), appeal dismissed 335 U.S. 906; Caldwell v. Fulton, 31 Pa. 475 (1858); National Light & Thorium Co. v. Alexander, 80 S.C. 10, 61 S.E. 214 (1908); Murray v. Allred, 100 Tenn. 100, 43 S.W. 355 (1897); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296 (1923); Morison v. American Association, 110 Va. 91, 65 S.E. 469 (1909); Freeport Coal Co. v. Valley Point Mining Co., 141 W. Va. 397, 90 S.E. 2d 296 (1955). We have found no state which holds that mineral interests are not "property."

does not merely limit the use of that interest; it destroys its value completely.

When there are no underlying mineral interests, a regulation prohibiting certain uses of surface lands may or may not constitute a "taking" of property. The regulation—which bars some uses—permits others. A property right is preserved, although diminished in value. Where regulation ends and taking begins in such cases is a matter of degree, *United States* v. *Central Eureka Mining Co., supra,* 357 U.S. at 168. In the case of mineral interests, however, the "property" is, for all practical purposes, the right to extract. See *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 414. To prohibit extraction is to take the property. The parallel respecting surface properties would be a "regulation" forbidding all uses but leaving legal title in the owner in order to avoid the payment of just compensation. Plainly, such a "regulation" would be unconstitutional. See *United States* v. *Causby,* 328 U.S. 256; *United States* v. *Kansas City L. Ins. Co.,* 339 U.S. 799. Cf. *United States* v. *Central Eureka Mining Co., supra,* 357 U.S. at 168.

In addition to these general considerations there are special circumstances disclosed by the record of this case which militate against the validity of Ordinance No. 16. When Appellants began their operations in 1927 the surrounding area was rural in character (R. 178). Gradually, over a period of more than 30 years, a community has grown up about the sandpit so that today the operation is in the center of a densely populated suburb. During the entire period Appellants' sandpit has been there for all to see; there is nothing clandestine about a dredging operation. Now, after all these years, the community asserts that Appellants'

business is a safety hazard and that it must be terminated. Similar cases are not uncommon in our industry.

Assuming that the community's decision is "reasonable,"—which we dispute (see, *infra*, pp. 15 to 22)—the question remains, as Mr. Justice Holmes wrote in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, 260 U.S. at 416, "upon whom the loss of the changes desired should fall." Quite naturally the community seeks to impose the loss upon Appellants. We submit, however, that circumstances of this kind require that the community bear the burden. Simple justice dictates that, if there must be an economic sacrifice for the benefit of the community, the cost should be borne by the community and not be arbitrarily imposed upon an individual.

A contrary holding would threaten our industry with mass confiscation. The stone producer or gravel pit operator whose operation has been engulfed by a new suburban community is *always* in a political minority in defending his right to continue in business. If the community can, without expense to itself, terminate his right to operate and impose upon him additional obligations such as the Town of Hempstead has imposed upon these Appellants, the possibilities across the nation for truly repressive and irresponsible political action against our industry are limitless.

We believe that the due process clause affords protection against just such abuse of the power of a political majority.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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